

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1331

To be argued by
JULIA P. HEIT

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Respondent,

vs.

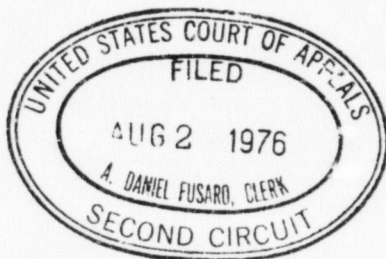
URBAN DIDIER,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES OF AMERICA,

v.

Defendant -
Appellant.

Docket No. : 76-1331

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered on June 1, 1976 in the United States District Court for the Southern District of New York (Cooper, J.), convicting Appellant Didier after trial of the crimes of conspiring to transport stolen securities in foreign commerce in violation of Title 18 U.S.C. Sections 2314 and 2315, and having caused stolen securities to be transported in foreign commerce in violation of Title 18 U.S.C. Sections 2314 and 2. Appellant was sentenced to a prison term of 6 months on the conspiracy count and 1 year on the substantive counts, said sentences directed to run consecutively. Appellant was

additionally placed on probation for 3 years and fined \$10,000 for each count for which he was convicted.

Appellant remains free on bail pending the disposition of this appeal.

QUESTION PRESENTED

Whether the Government's inexcusable failure to re-try Appellant within 90 days from the date of the mistrial in accordance with prior Rule 6 and present Rule 7 of the Southern District's Rules for Prompt Disposition of Criminal Cases mandates the dismissal of the indictment, especially in view of the fact that Appellant had undergone undue hardship by being forced to await his retrial for a prolonged period of 28 months.

STATEMENT OF FACTS

Appellant, Urban Didier, and his two co-defendants, John Lombardozzi and Edward Ashdown, were charged in an indictment filed on February 16, 1973 with conspiring to violate Title 18 U.S.C. Sections 2314 and 2315 in that they knowingly caused stolen securities to be transported in foreign commerce. Appellant and John Lombardozzi were additionally charged with violating Title 18 U.S.C. Sections 2314 and 2 in that it was alleged that on November 18, 1970,

they knowingly caused stolen securities to be transported from Zurich, Switzerland to New York City.

On November 26, 1973, Lombardozzi pleaded guilty to the first count of the indictment and on this same date, Appellant and Ashdown proceeded to trial before the Hon. Ben Cooper. Thereafter, on December 3, 1973, a mistrial was declared because the jury announced that they were hopelessly deadlocked. Appellant was not accorded a retrial until April 12, 1976, nearly 28 months after the declaration of the mistrial. It is therefore his position that the extraordinarily lengthy delay on the part of the Government in affording him a retrial was in direct contravention of Rule 6 of the Southern District's Rules for the Prompt Disposition of Criminal Cases, and that under such circumstances, he is now entitled to the severe remedy of the dismissal of the indictment against him.

PROCEEDINGS SUBSEQUENT TO THE MISTRIAL AND PRIOR TO THE RETRIAL

On June 30, 1975, counsel in Appellant's behalf moved to dismiss the indictment on the ground that the Government failed to re-try his case within the 90-day period specified by Rule 6 of the Southern District's Rules for the Prompt Disposition of Criminal Cases. Counsel relied on this Court's recent decision of United States v. Drummond, 511 F.2d 1049 (1975) wherein it was held that a delay in retrial

beyond the 90-day allowable period will not be tolerated in the future unless the period is extended for good cause. Counsel claimed that when the date for the re-trial was set, Appellant was not represented by counsel and was not advised of his right under the Court Rules to proceed promptly to trial. Therefore, it could not be found that Appellant knowingly waived his right to a speedy trial under the Rules of the Court. Moreover, according to counsel, Rule 8 specifically provides that a demand is not necessary for the purpose of invoking the rights conferred under this regulatory scheme and further, that no waiver will be implied where a defendant is without counsel, unless he has notice of these Rules.

Counsel at this time raised the additional allegation that the undue delay in re-trying the case caused Appellant undue mental anguish and financial hardship.

In a separate affidavit filed on July 7, 1975, Appellant alleged that he was never advised of his right to an immediate retrial, nor did he voluntarily or knowingly waive such a right. Appellant explained that his former attorney, Robert Talcott, terminated their relationship in January of 1974 because he was unable to continue to afford his services at that particular juncture. His present attorney, Rudolph Harper, was not retained until

late April or May of 1975. Consequently, from January of 1974 to May of 1975, he was without the assistance of counsel.

Appellant further reaffirmed that the long delay in retrying his case caused him undue mental and financial hardship.

In opposition to Appellant's motion, the Government, through Assistant United States Attorney Gold, first set forth the following facts:* On May 22, 1974, the Government filed its notice of readiness to re-try Appellant and Ashdown; however, in a letter dated June 10, 1974, the Government requested that the court set down the retrial for the fall of 1974 in order to allow sufficient time for the United States Court of Appeals for the Fifth Circuit to decide Ashdown's appeal from a mail fraud conviction for which he had been sentenced to a 7 year prison term. This request was made only after discussions with Ashdown's attorney, and without any objection from either him or his client; Judge Cooper, in a letter dated June 17, 1974, advised the Government that the retrial of the case would be set down for the fall of 1974; Ashdown's appeal was not affirmed until sometime in the winter or Spring of 1975.

*The Government's affidavit was filed on June 28, 1975.

In order to refute Appellant's contention that the Drummond decision was applicable to his case, the Government claimed that shortly after the rendition of this decision (February 11, 1975), the Government "out of an abundance of caution" attempted to contact Judge Cooper to arrange for a prompt retrial, but was advised that Judge Cooper, in an effort to assist distant districts with pressing judicial business, would be sitting outside the Southern District of New York from February 17, 1975 to March 14, 1975. Hence, in another letter dated March 25, 1975, the Government requested that the matter be scheduled for retrial on a specified date. In response to this letter, the court in a letter dated March 27, 1975, directed that all counsel appear at a pre-trial conference on April 2, 1975 for the purpose of fixing a trial date. Copies of both communications were mailed to Appellant's counsel, Robert Talcott, at his last known address. However, because Mr. Talcott had moved his offices to a different address without informing either the court or the Government, copies of the March 25th and 27th letters never reached him, and were returned unopened. Whereupon, the court then directed the Government to telephone Mr. Talcott to inform him of the court's direction that he appear for a pre-trial conference at which time a date for retrial would be fixed. In a subsequent telephone conversation, Mr. Talcott informed the

Government that he had not been paid for having represented Appellant at the first trial, and therefore he was uncertain as to whether he would continue to represent Appellant in connection with the retrial. He did assure the Prosecutor that he would advise him on or before April 9th as to whether he would represent Appellant at his retrial. Mr. Talcott thereafter declined to represent Appellant and informed the Government that he did not know whether his former client would retain new counsel, or seek assigned counsel. In late April or early May of 1975, Appellant first advised the Government that he was going to retain Rudolph Harper as his new attorney.

Accordingly, Mr. Harper attended the pretrial conference on June 12, 1975 and advised the court that he would be ready to try the case on September 2, 1975.

Thus, it was the Government's position that the retrial of Appellant and Ashdown did not occur during 1974 because the court and the Government were anxious to avoid trying the two defendants separately, and thereby needlessly consuming the time of the District Court.* The Government

*Interestingly enough, in a letter dated June 10, 1975, the Government informed the court that it would strongly prefer to await the outcome of Mr. Ashdown's appeal, so that if his conviction is affirmed, he can be severed and granted immunity and Appellant could be retried alone. The Government stated outright "Hopefully, a retrial against one defendant would be less time consuming than a trial against both."

represented that both the court and the Government were prepared to go forward with the retrial of this case within the 90 days from the date of the Drummond decision since it was at this time that the United States Attorney was first put on notice of the possibility that the retrial of the case might be subject to the provision of Rule 6. According to the Government, the retrial did not occur within this 90 day period solely because of the aforementioned conduct of Appellant and his then attorney, Mr. Talcott.

Finally, the Government alleged that up to the time of the filing of this application, neither counsel or Appellant had taken any steps to indicate that Appellant was interested in a prompt retrial.

In reply to the Government's opposing affidavit, Appellant pointed out that since the fall of 1974, the delay in his retrial was caused solely by the Government's interest in allowing co-defendant Ashdown to appeal his conviction, and await decision on that appeal. According to Appellant, there was every reason to believe that the Government was interested in the decision regarding Ashdown since they were considering offering him immunity in return for his testimony against Appellant at a retrial. Hence, Appellant claimed that this delay, caused only by the Government's hopes of obtaining

damaging testimony of a co-defendant, must be held to be a violation of the remaining defendant's constitutional right to a speedy trial. It was therefore Appellant's position that any delay centered around Ashdown, and not him. It was also pointed out that it has recently come to counsel's attention that Ashdown may not be available on the scheduled trial date, and his potential absence makes a mockery of the Government's attempts to justify this delay.

Finally, in answer to the Government's assertion that Appellant had in part been responsible for the delay, it was asserted that if the Government were truly anxious to relay critical information to Appellant, it could have contacted him directly, since at all times they possessed his address and telephone number.

In a written opinion dated July 26, 1975, Judge Cooper denied appellant's motion. The court's ruling was essentially based upon the reputed confusion on the part of the Government regarding the import of Rule 6 which, according to the court, was construed as excusable delay under Drummond. Moreover, the court was of the opinion that any delay subsequent to March of 1975 was attributable to both Appellant and his former counsel's failure to inform the court of the attorney's change of address. Hence, the

court concluded that the violation of the 90-day Rule could be excused for good cause.

In another motion dated December 30, 1975, Appellant again moved to dismiss the indictment based upon the Government's failure to comply with Rule 6 of the Southern District. After reiterating the past history of the case, Appellant noted that although the Government filed its notice of readiness to proceed with the retrial on May 23, 1974, they nevertheless delayed said trial in order to await the affirmance of Ashdown's appeal which was not decided until March 17, 1975. Appellant aptly recognized that prior to May 2, 1975 he was not reachable through his attorney, but could be contacted in person. Since the Government was aware of his present address and telephone number, the Government through the use of due diligence could have contacted him. Therefore, his absence under these circumstances should not be held against him. In this context, Appellant again stated that Rule 8 specifically mandates that a demand for retrial is not necessary.

Furthermore, according to Appellant, on September 2, 1975, when the final date for retrial was set, Mr. Harper answered ready to proceed and his position remained unchanged up to the present. It was thus evident that while the Government also announced that they were ready, this was not

their true position. In support of this particular contention, Mr. Harper stated that at the end of August of 1975, he was contacted by Assistant United States Attorney Gold and was told that the September 2nd date had been adjourned. Mr. Gold gave no reason for said delay. It was only on November 25, 1975 that the Government filed another notice of readiness. Counsel therefore maintained that if the many countless delays are sustained, both the Rules and the accompanying court cases are meaningless.

In conclusion, counsel asserted that Appellant has sustained overwhelming prejudice as a result of the undue delay in retrying his case. Appellant has been unable to pursue his career as a member of any security firm. He was offered the opportunity of serving on the Board of Directors of Snodgrass and Company, but he refused this offer for fear of disclosure of the pending trial.*

*In an accompanying affidavit, Charles Snodgrass confirmed that in February of 1973, he had offered Appellant a position to become a member of his firm. At the end of the month, Appellant thanked him for his offer and asked for the application to be withdrawn since he knew that he could not be accepted for membership with the pending indictment. Mr. Snodgrass concurred with Appellant's decision.

Appellant was also asked to serve on various boards and commissions. Specifically, the Lieutenant Governor of California, Mervin Dymally, requested that he serve on the Advisory Committee of the Economic Development Commission of California, and on the Commission of the Californias. Both offers were similarly refused for fear that disclosure of the pending indictment would be a source of embarrassment to his family, the Lieutenant Governor and himself. Additionally, Appellant was forced to resign as Vice President of Realty Investment Associates, Inc., because of his arrest and indictment. He was also precluded from pursuing his second field of endeavor, that of real estate, because the indictment prohibited him from obtaining a real estate license.

Hence, as a result of said indictment and the repeated delays, Appellant was forced to maintain a low profile in the business community for fear that discovery of the pending indictment would require him to start anew in a completely different occupation.

Mr. Harper also attested that he had personal knowledge of the hardships that Appellant was forced to endure as a result of the delay in the retrial. He had personal knowledge of Appellant's relationship with Realty

Investment Associates, Inc., a successful real estate firm doing business on a national level. / Mr. Harper stated that he had been their corporate counsellor for three years, and at the time, that Appellant was indicted, the president of this corporation, Hugh Pike, sought his advice regarding whether the company should continue with Appellant as Vice President. He advised Mr. Pike that Appellant would be a liability to the corporation. Based upon this opinion, Appellant was asked to submit his resignation, which he did. According to Mr. Harper, Appellant was unemployed for a number of months following his termination of employment with Realty Investment Associates. Mr. Harper then became associated with Appellant as his legal and business advisor, and therefore had personal knowledge of his unsuccessful attempts to regain his business status in the community. On May 15, 1975, Appellant was forced to file bankruptcy in the Central District of California. However, he did manage to obtain secondary financing on his home in order to voluntarily withdraw the petition and satisfy his creditors.

Counsel stated that he has knowledge that Appellant also refused to get involved in many things because of the pending indictment. According to counsel,

Appellant has continued to maintain a low profile in business, thereby minimizing his chance of success, as well as his income. Additionally, his attitude and self-esteem has diminished considerably. He feared taking a step in any direction because he was afraid that the exposure of the indictment would force him into totally unrelated fields. Mr. Harper characterized Appellant as not the ordinary criminal who lives by his wits alone, but one who depends on the business world and upon his dealings with bankers and the higher echelons. Therefore, Mr. Harper opined that the circumstances of the prolonged delay has not only precluded Appellant from enjoying normal business relationships, but also was an agonizing experience for him.

In answer to this particular motion, the Government in an affidavit dated February 20, 1976 asserted that on June 17, 1975, Mr. Panzer, counsel for Ashdown, told the Government that he could not contact his client for an extended period of time, and that his whereabouts were then unknown. Since the Government was aware that the Fifth Circuit had recently affirmed Ashdown's conviction, they feared that he had become a fugitive. Accordingly, on July 18, 1975, the court issued a bench warrant for Ashdown's arrest. However, on August 18, 1975, Mr. Gold was informed

by the United States Deputy Marshall that efforts were still being made to apprehend Ashdown. The court was informed of this fact, together with the fact that the United States Marshall's service had not given them any reason to believe that Ashdown would be apprehended in time to stand trial on September 2nd. The Government stated that the prospect of having to try the case twice because a defendant had suddenly become a fugitive was "plainly unappealing." Thus, at the Government's request, and to avoid the necessity of having two trials, the trial date was adjourned sine die in order to afford the Government a fuller opportunity to secure Ashdown's presence for the joint trial. Immediately following the court's decision to delay the trial further, Mr. Harper was informed of the reasons for the new adjournment and was instructed to contact the court directly if he had any objection.

In a supplemental affidavit, the Government again alleged that Ashdown's whereabouts were unknown. In any event, it was the Government's position that because of the court's lengthy trial schedule involving incarcerated defendants, the court could not try the present case even had Ashdown been available.

Finally, the Government contended that the flight of a co-defendant constitutes good cause to adjourn the trial, and if the remaining defendant has any objection to said delay, it is incumbent upon him to move for a severance. In the same breath, the Government admitted that a request for a severance in this case would have been futile, and would not have been granted.

Finally, the Government urged that Appellant's special qualifications as a criminal do not entitle him to any special consideration or relief.

In its opinion dated February 19, 1976 and filed on February 20, 1976, the court again denied Appellant's motion to dismiss the indictment. First, the court relied on the fact that Mr. Harper made no objection to the September 2nd adjournment. And second, the court found that the Government should be given a reasonable period to obtain the presence of a fugitive such as Ashdown and the remaining co-defendant, if he so chooses, must move for a severance to obtain an immediate trial. The court, however, admitted that had Appellant moved for a severance, his motion would have been denied due to the backlog of its cases. And third, the court stated that after September 2nd, its energies were expended in presiding over numerous trials of incarcerated defendants.

TRIAL

Since Appellant is not raising any issues emanating from the trial, a summary of the facts is not relevant for the purposes of this appeal. It is sufficient to state that the Government's case was relatively short, as it was based solely upon the testimony of Dinty Whiting. Mr. Whiting's testimony was pitted against the testimony of Appellant, who consistently maintained that he had no knowledge that the securities were stolen. It should be noted that Mr. Whiting at no time informed Appellant directly that the securities in question had been stolen. The jury was therefore left to determine whether in view of all the surrounding circumstances, Appellant should have had knowledge of this critical fact. Unfortunately, the jury, at the conclusion of the trial, resolved this issue against Appellant, and found him guilty of both the conspiracy and substantive charges.

ARGUMENT

POINT I

THE GOVERNMENT'S INEXCUSABLE FAILURE TO RE-TRY APPELLANT WITHIN 90 DAYS FROM THE DATE OF THE MISTRIAL IN ACCORDANCE WITH PRIOR RULE 6 AND PRESENT RULE 7 OF THE SOUTHERN DISTRICT'S RULES FOR PROMPT DISPOSITION OF CRIMINAL CASES MANDATES THE DISMISSAL OF THE INDICTMENT, ESPECIALLY IN VIEW OF THE FACT THAT APPELLANT HAD UNDERGONE UNDUE HARDSHIP BY BEING FORCED TO AWAIT RETRIAL FOR A PROLONGED PERIOD OF 28 MONTHS

Despite this Court's repeated warnings that violation of the Rules for the Prompt Disposition of Criminal Cases will not be tolerated (United States v. Drummond, 511 F.2d 1049; United States v. Roemer, 514 F.2d 1377), the Government in this case has flagrantly chosen to ignore such an admonishment. By using every conceivable excuse to delay Appellant's retrial and by not actually re-trying him until 28 months after his original trial, the Government has stretched the Rules of the Southern District well beyond their breaking point and has thwarted the Rules' prime objective of requiring the prompt disposition of criminal cases. If the Rules are to have any real impact on the administration of the criminal justice system, the Government should not be permitted to pay only "lip service" to its obligations under this regulatory scheme. It must therefore be finally recognized that the Government's compliance can be achieved only through the drastic action of the dismissal of the instant indictment.

The starting point of this long, drawn-out saga must be deemed to have commenced on December 3, 1973, the date of Appellant's mistrial. At that time, Rule 6 specifically provided that a defendant must be accorded a retrial within 90 days of the aborted trial unless good cause can be established for the ensuing delay. The chronological history of this case will unequivocally demonstrate that the Government made every effort to circumvent this clear-cut mandate by flooding the court with a myriad of excuses -- none of which constituted good cause within the meaning of the Rules.

The Government filed its first notice of readiness to proceed with the retrial on May 22, 1974 -- well beyond the prescribed 90 day period. Obviously, such an act was simply a pro forma gesture, since the Government had no intention of proceeding with the trial until Ashdown's appeal in the Fifth Circuit was finally decided. At no time during this interval was Appellant contacted concerning this delay. It was only Ashdown and his counsel who were privy to the Government's plans. Appellant therefore was not even afforded the opportunity of objecting to what was to be the first of many long delays in his retrial.

In any event, a delay for the sole purpose of awaiting the disposition of a co-defendant's appeal should not be excused as good cause within the meaning of the Rules. The Government's true objective in awaiting the disposition of this appeal was not to avoid the necessity of multiple trials, as professed, but was rather to attempt to induce Ashdown to testify against Appellant should he lose his appeal. The inordinate delay of 15 months, premised entirely on the remote possibility that Ashdown might be induced to testify against Appellant cannot be sanctioned. Perhaps a different situation might be said to have existed had the Government already struck their bargain with Ashdown, or if the Government was proceeding to trial for the first time. However, unduly delaying the re-trial for such an extended period based upon the sheer speculation that the Government might be able to enhance its case against the remaining defendant was not within the purview of the Rules, especially when it is at the expense of the defendant's right to a speedy trial and when he was not even given the opportunity to object to such an untoward delay.

During the period the Government was awaiting the Fifth Circuit determination regarding Ashdown, this Court on February 11, 1975 in United States v. Drummond, supra, laid to rest any doubt the Government could possibly entertain

regarding its obligation to re-try Appellant within 90 days from the conclusion of the first trial. In Drummond, supra, this Court held that the Rules meant precisely what they stated -- the retrial must commence within this 90 day period. From this point on, the Government, having already delayed the retrial for 14 months, could no longer rely on ignorance or confusion in failing to accord Appellant a prompt retrial.* However, despite its awareness of Drummond, the Government still chose to further delay the retrial and did not in fact re-try Appellant until 14 months after this decision.**

*In its opinion of July 26, 1975, the court condoned the Government's inaction based upon their confusion as to their obligation under the Rules. Such a conclusion is difficult to reconcile, since at no time in any of their moving papers did the Government ever claim that their actions were prompted by confusion or any misunderstanding of the Rules.

**Less than two months after the Drummond decision, this Court further clarified the intent of the Rules and the court's and Government's obligations to comply with their objectives in United States v. Roemer, supra. Even armed with the knowledge of this decision, the Government still failed to re-try Appellant until another year had elapsed.

In an effort to condone this extraordinarily long delay, the Government again offered a number of specious excuses which the court erroneously denominated as "good cause" under the Rules.

The Government first claimed that after Drummond was decided, "out of an abundance of caution" it asked Judge Cooper for a prompt retrial. However, the subsequent series of events show beyond any doubt that the Government's desire to comply with Drummond was indeed shortlived. First, they alleged that they were unable to re-try Appellant immediately after Drummond because they could not contact Appellant's former attorney and did not reach him until April of 1975. In the context of this case, the Government should not be permitted to rely on the mistaken presumption that once in the case, an attorney will represent his client forever. Appellant's relationship with this attorney had terminated well over a year before. It is submitted that the failure to contact Appellant was due only to the Government's negligence, and not to any nonfeasance on the part of Appellant or his former attorney. It is undisputed that the Government at all times possessed Appellant's address and telephone number. Yet, they made no effort whatever to write him or telephone him regarding their intentions in the case. They did not even send him a copy of the letters

sent to his former attorney. Moreover, if the Government had properly notified Appellant of their decision to await the Fifth Circuit's decision in the Ashdown case the year before, they would have learned at that point that Appellant was not represented by counsel and that he therefore would have to be personally informed of any action taken in his case.

Nevertheless, even assuming that we charge Appellant with the delay because of his change of attorneys, said delay encompassed only a little more than five months. The Government still remains responsible for the other 23 month delay. Whatever rationalization the Government employed for the prior delay, they could not present good cause for any further delay beyond September 2, 1975 when Appellant's new attorney, Mr. Harper, announced that he would be ready for trial. It is incredible that in February of 1975, the Government represented that they were anxious to re-try Appellant promptly, pursuant to the Drummond decision. It is obvious their professed "wishes" were not meant to come to fruition because the following September of that year, they again sought to delay Appellant's retrial.

From August of 1975 up to the time of Appellant's retrial, the Government attributed this particular delay

to Ashdown's status as a fugitive. Again, the Government claimed that the prospect of having to try the case twice was "plainly unappealing," and suggested that the trial be adjourned to give the Federal Marshall an opportunity to apprehend Ashdown. Given the fact that Appellant's retrial at that point had already been unduly delayed for 21 months, the Government was obligated to permit Appellant to proceed to trial separately, however "distasteful" such prospect was to them. It cannot be overlooked that it was the Government who initially delayed the retrial because of Ashdown's appeal. During that entire interval, they could have secured Ashdown's presence for a joint trial which, according to their allegations, was so critical to the "overloaded" judicial system. Yet, the Government chose to await the determination of the Fifth Circuit appeal only because their desire to induce Ashdown to testify against Appellant far outweighed the practicality of a joint trial at that time.

Furthermore, it is evident that the Government's clamors regarding the necessity of a joint trial were not truly made in good faith. At one point, they argued before the court that a joint trial was necessary because they did not want to waste the court's time with a double trial. However, in a letter to the court dated June 10, 1975, the Government represented that a retrial against one defendant

would be less time consuming than a joint trial. Such positions are entirely inconsistent. Still another vital indication that the Government's desire for a joint trial was somewhat questionable is the brevity of the trial itself. This was not a complicated conspiracy case involving numerous defendants and co-conspirators or one covering an expansive period of time. On the contrary, this was a one-witness case. Appellant's testimony was pitted solely against the testimony of Dinty Whiting. This was the sum and substance of the case. Certainly, the court system would not have suffered if Appellant had been retried alone within the 90 day period specified by the Rules.

There is no question but that the court already gave the Government great leeway in permitting the delay of the retrial pending the determination of Ashdown's appeal. No further delay, because of Ashdown's subsequent flight, should have been sanctioned, especially when 20 months had already elapsed since the declaration of the mistrial. Both the Government and the court at this juncture abused the purpose and the intent of the Rules of the Southern District.*

*It should also be noted that although Rule 5(d) states that an excludable period includes the time period when a defendant is unavailable (i.e., a fugitive), this section refers only to computation of time when the Government should be ready for trial and not to re-trials. In Drummond, the court specifically delineated this distinction, finding that Rule 5 made no mention of Rule 6. Hence, the Government cannot rely on Rule 5 to justify the lapse of time in which they attempted to apprehend Ashdown. Thus, the only issue is whether flight is good cause for the delay under Rule 6.

In denying Appellant the relief sought, the court concluded that Appellant waived his right to be tried within the time period specified by the Rules because he failed to object to the adjournment caused by Ashdown's flight, and because he failed to move for a severance.

The court's finding that it was incumbent upon Appellant to both object to the adjournment and move for a severance lacks merit. Appellant's first motion to dismiss the indictment due to the Government's failure to comply with the Rules placed the court and the Government on notice that he wished a speedy retrial and that he had every intention of invoking the benefits of the Rules. Any further action on the part of Appellant would have been merely superfluous. To hold that Appellant, under these circumstances, has waived his rights under the Rules is unmitigated fiction.*

*We would draw this Court's attention to the fact that Appellant's counsel in his affidavit asserted that the Government only told him that the September 2nd date had been adjourned by the court and claimed that the Government did not advise him of the reason for the delay. The court completely ignored this assertion and credited the Government's representation that counsel was informed of the reason for the delay and was also invited to register any objection directly to the court. At the very least, the court should have made an attempt to resolve this critical conflict of information. We do not think the Assistant United States Attorney's allegations should automatically be deemed more credible or trustworthy than those of defense counsel.

Moreover, the court's reliance on United States v. Lasker, 481 F.2d 230 (2d Cir., 1973) is misplaced. A condition precedent to the defendant's moving for a severance in Lasker was a finding by the court that the delay had been unreasonable. Here, the court never made such a finding. Hence, any application for a severance would have been an exercise in futility. Ironically, both the court and the Government admitted outright that had Appellant moved for a severance, his motion would have been denied. It strains logic to compel a defendant to make a useless gesture to obtain what is his due under the Rules, especially when he already has demonstrated the sincerity of his endeavors to obtain a prompt retrial by his prior motion.

Additionally, the court's decision to re-try the cases of incarcerated defendants before Appellant's case through the months of September to December of 1975 is difficult to understand in view of the fact that the court was well aware that Appellant's retrial had been pending for such a long time and that the Rules required an immediate retrial. Undoubtedly, the court had sufficient notice to place the case on its own calendar or transfer it to a different judge, since counsel three months before had informed the court that he would be ready to re-try the case on September 2, 1975. Moreover, Drummond specifically rejected the congested calendar as a valid excuse to delay the retrial beyond the prescribed

period. The court stated:

Where a multiple judge court uses the individual calendar system, all judges must share responsibility for the prompt disposition of criminal cases, must employ a team approach to those cases, and, when necessary, must reassign them in order that they may be tried according to the commands of the Sixth Amendment and Criminal Rules 48(b) and 50. If a judge is otherwise long committed in another case or is delayed in getting to the criminal cases on his calendar by reason of illness, personal misfortune, or press of other business, this obviously does not serve to toll the enforcement of the right to a defendant awaiting trial in that judge's criminal calendar. 511 F.2d at p. 1083 [emphasis supplied]

And since Drummond was decided in February of 1975, the court below in September of 1975, must be deemed to have had notice of the above caveat and thus should not have used the ill-advised excuse of the crowded calendar to justify the further delay in Appellant's retrial.

Finally, on December 30, 1975, Appellant in a second motion again attempted to obtain compliance with the Rules. Significantly, the Southern District had adopted an even more stringent Plan regarding retrial which became effective on September 29, 1975. Under the new Rule 7, the Government was given only 60 days from the date of the mistrial to re-try the defendant, and where the 60-day deadline

could not be met, the Government was given a period not to exceed 180 days. Hence, under these newly promulgated Rules, putting aside all the previous delays and even accepting all of the Government's many excuses, the Government at most had only 180 days from September 29, 1975 to re-try Appellant. Unfortunately, they ignored this proviso as well and did not bother to re-try Appellant until April 12, 1976. This additional and blatant violation of the Rules should not be condoned in view of the fact that the Government had the benefit of the Drummond and Roemer decisions and knew full well that this Court had every intention of making certain that the Rules were to be enforced -- even on the pain of dismissal of the indictment.*

It is thus clear from all the aforementioned facts that the Government sought the delay in Appellant's retrial only to seek a strategic advantage. They gambled that they

*Although the Rules were designed primarily to benefit the administration of criminal justice and not just the defendant, nevertheless, this Court should not overlook the prejudice that inured to Appellant as a result of the unwarranted 28 month delay. As set forth in the facts, Appellant underwent severe emotional stress and financial hardship during this long ordeal. He did not claim a general prejudice flowing from the delay and articulated specific instances, many of which were fully corroborated by his attorney. Contrary to the Government's position, the defendant in Appellant's position does have far more to lose by the stigma of a pending indictment than does the recidivist.

could manipulate the Rules to their favor in order to eventually secure Ashdown's testimony against Appellant. While both Drummond and Roemer state that the "good cause" provision must be construed with "an awareness of the practicalities" (511 F.2d at p.1053), we do not think the term "practicalities" was intended to encompass a situation wherein the Government indefinitely delays the retrial in the hopes that they can improve their original case.

Moreover, in Drummond and Roemer, this Court was confronted with a series of bureaucratic and negligent errors whereas in this case this Court is confronted with a situation wherein the Government, with the assistance of the court, acted deliberately to circumvent the Rules. The time has come to give this Court's admonishment full effect:

Measures must be taken both in the offices of the courts and the offices of the government prosecutors to flag the time requirement in all criminal cases. Failure to do so in the future will not be treated lightly. Particularly under the generally more stringent requirements of the Speedy Trial Act of 1974, U.S.C. Sections 3161-74, scheduled to take effect on July 1, 1975, negligence of the sort displayed in this case is likely to lead to the dismissal of the indictments. United States v. Roemer, 514 F.2d at 1382.

Accordingly, this Court should dismiss the instant indictment against Appellant with prejudice because of the deliberate and wilful failure of the Government to comply with the Rules requiring the Prompt Disposition of Criminal Cases.

CONCLUSION

FOR THE ABOVE STATED REASONS APPELLANT'S
CONVICTION SHOULD BE REVERSED AND THE
INDICTMENT DISMISSED.

August, 1976

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers
COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES OF AMERICA,

Respondent

- against -

DIDIER,

Defendant - appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 2nd day of August 1976 at One St. Andrews Plaza, New York, New York
deponent served the annexed Brief upon
Robert B. Fiske Jr.

the Attorney in this action by delivering ³ true copy^s thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 2nd
day of August 1976

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977